State v. Momah (Charles)
Dissent by Alexander, C.J.

No. 81096-6

ALEXANDER, C.J. (dissenting)—I dissent because, in my view, the majority wrongly concludes that Charles Momah "affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it." Majority at 11. Except for Momah's tacit participation in the closed-door questioning, there is no support in the record for any of these conclusions. Indeed, the record discloses that Momah did not affirmatively assent to closure, did not argue for the expansion of it, was not asked if he objected to it, and did not benefit from it. The record demonstrates, rather, that the trial court closed jury voir dire on its own initiative and failed to consider any of the constitutional rights we discussed in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). Neither did the trial court engage in the closure analysis made mandatory by that decision. The trial court's closure of the courtroom to the public without first performing the *Bone-Club* test is a structural error that cannot be deemed harmless. I would, therefore, reverse Momah's conviction and remand for a new trial.

I

The Washington Constitution, like the Sixth Amendment to the United States Constitution, guarantees that in criminal proceedings, the accused has the right to a "public trial by an impartial jury." Const. art. I, § 22; U.S. Const. amend. VI. But unlike the United States Constitution, the Washington Constitution contains additional provisions that ensure the right to open court proceedings. One of these provisions is article I, section 10, which recognizes the public's right to have "[j]ustice in all cases . . . administered openly." The other is article I, section 35, which provides that victims of crimes "have the right to . . . attend trial and all other court proceedings the defendant has the right to attend." The latter provision is a "basic and fundamental right[]," which "ensure[s] victims a meaningful role in the criminal justice system and . . . accord[s] them due dignity and respect." Const. art. I, § 35.[1]

The aforementioned sections of the Washington Constitution "serve complementary and interdependent functions in assuring the fairness of our judicial system." *Bone-Club*, 128 Wn.2d at 259. Because these provisions safeguard the right to public trials, courtrooms should be closed only in "rare circumstances." *Id*. at 258. In order to protect the various interests implicated by the aforementioned constitutional provisions, our court has developed a strict, well-defined standard for closing a courtroom, which complies with both federal and state constitutional requirements. It is

[1]The public trial right extends to jury selection. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.2d 825 (2006).

the *Bone-Club* "test."[2]

II

The *Bone-Club* test is a standard by which trial court judges can determine whether or not a courtroom should be closed to the public. Under this standard, the trial court should enter specific findings to support closure of the courtroom or, at the very least, set forth on the record what facts caused it to conclude that closure was justified. Findings spread on the record are particularly critical in a case where no one objects to closure, since in such circumstances the judge has an overriding responsibility to safeguard the constitutional right to a public trial. As I noted above, the record reveals that here, the trial judge closed the courtroom on his own initiative and he did so without any discussion of the *Bone-Club* criteria. Furthermore, the trial judge did not justify the closure by entering written findings of fact or setting forth oral findings on the record. In the absence of a closure hearing and explicit findings

[2]The five requirements of the test are as follows:

"1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.

"2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

"3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

"4. The court must weigh the competing interests of the proponent of closure and the public.

"5. The order must be no broader in its application or duration than necessary to serve its purpose." *Bone-Club*, 128 Wn.2d at 258-59 (alteration in original) (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

justifying the closure, the constitutionally required standard for closing a courtroom is not met. *See In re Pers. Restraint of Orange*, 152 Wn.2d 795, 810-11, 100 P.3d 291 (2004) (failure to follow the *Bone-Club* closure test resulted in a record that demonstrated the trial judge did not identify a compelling interest, fully considered alternatives, or weighed competing interests).

A

In affirming the trial court, the majority focuses on what it determines was the trial judge's justification for closing the courtroom. The claimed justification was the trial court's concern that prospective jurors could become biased through exposure to the questioning of members of the jury venire who had prior knowledge of the case. While this concern is understandable, it does not justify closure of the courtroom during the jury voir dire. As I point out hereafter, there were less restrictive means of preventing juror contamination than a complete closure of the courtroom.

Contrary to the majority's reading of the record, Momah's counsel did not ask the trial judge to close the courtroom during jury voir dire. Neither did he agree to the closure. Momah's counsel simply suggested that jurors be questioned individually in a courtroom. During the ensuing discussion about how to handle the individual questioning, the State broached the idea of questioning jurors in a private setting. Ultimately the trial judge determined that the questioning of individual jurors would take place in chambers. Responding to a juror who said he did not want to be individually questioned, the trial judge informed the venire that he had "decided it would be in

everybody's interest if you would be questioned individually." Report of Proceedings (Oct. 11, 2005) at 19.

During this closed phase of voir dire, jurors were shuttled between the main jury room and two different courtrooms. One of the courtrooms held a subset of the venire that included jurors who had prior knowledge of the case and whose questionnaires indicated that service on the jury would be a hardship. Once the hardship issues were dealt with, the trial judge arranged to have the other jurors brought into chambers one at a time for individual questioning. After a break for lunch, the jury selection process reconvened in another courtroom. During this phase, some members of the jury venire remained in the courtroom while others were taken into a jury room for individual questioning.[3] Before prospective jurors were questioned individually in the jury room, the trial judge said the following:

> I guess we have twenty folks outside in the hall. What I propose to do is have them come into the courtroom, we will move to the jury room for the individual questioning, and question them one at a time. I thought about having them in the jury room, but there is (sic) only 16 chairs.

Id. at 105.

On the third day of jury selection, some prospective jurors were again questioned individually. Unlike the earlier process, however, the trial judge directed that individual questioning occur in the courtroom. On this occasion, those persons designated for individual questioning were held as a group in a jury room and

[3]In total, 17 jurors were questioned privately, 13 in chambers, and 4 in the jury room.

summoned one at a time into the courtroom for questioning.

There is, in my view, a substantial distinction between, on the one hand, questioning prospective jurors individually and, on the other, questioning them privately in chambers or in a jury room with the door closed. As noted above, the questioning of prospective jurors individually in order to avoid juror contamination is appropriate in certain cases and the trial judge may well have had legitimate reasons for concluding that certain members of the jury venire be questioned individually. But this could have been done in open court. Questioning prospective jurors in the privacy of chambers or a jury room with the doors of these rooms closed to the public is a de facto courtroom closure. The question then becomes was the courtroom closure justified?

B

Our cases require a trial court to "resist a closure motion except under the most unusual circumstances." *Bone-Club*, 128 Wn.2d at 259. As noted above, the record demonstrates that neither party advocated for closure of voir dire. Instead, the trial judge closed the courtroom without prompting to individually question prospective jurors in the privacy of chambers and later in a closed jury room. We have previously applied the *Bone-Club* criteria to this type of closure. *See Orange*, 152 Wn.2d at 808 (temporary closure of voir dire is a closure that must meet the *Bone-Club* standard).

Under *Bone-Club*, the proponent of closure must identify a compelling interest for closure, and if that interest is something other than the accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that interest. When

neither party proposes closure, it is the trial judge's responsibility to identify the compelling interest or interests that support closure. The record clearly demonstrates that the closure was primarily motivated by the trial judge's preference for questioning certain members of the jury voir dire in private. Unfortunately, the record lacks any hint that the trial judge considered any other interests prior to conducting a portion of juror voir dire in a nonpublic setting. Without explicit findings in the record, there is no way for this court to determine whether the trial judge considered whether keeping voir dire open to the public presented a "serious and imminent threat" to the selection of a fair and impartial jury.

The *Bone-Club* criteria directs a trial judge to consider the least restrictive means available to protect threatened interests. This means that the judge must consider alternatives to closing the courtroom. *Bone-Club*, 128 Wn.2d at 260. Here, there was an obvious alternative to closure, that being the individual questioning of jurors in the courtroom. This could easily have been accomplished because, as the record shows, there were at least three rooms available among which jurors were shuttled—two courtrooms and the main jury room. Additionally, there was a jury room adjacent to one of the courtrooms that could have been used to hold jurors until they were ready to be brought into the courtroom for individual questioning. The ease with which jurors could have been summoned for questioning in open court rather than in a room closed to the public is demonstrated by the fact that the trial judge used this method for the questioning of jurors on the third day of voir dire. Thus, it is clear that a

less restrictive alternative to closure was readily available. *See Orange*, 152 Wn.2d at 810 (describing alternatives to closure that the trial court failed to consider).

C

The *Bone-Club* test also requires the trial judge to weigh the interests in favor of closure against competing interests. Regrettably, the trial judge closed the courtroom without providing any analysis and discussion on the record concerning the rights of the defendant, the public, or victims to have the trial conducted publicly. Absent the required analysis, this court cannot determine whether the constitutional rights held by those parties were considered or ignored.[4]

The majority incorrectly assumes that closure of the courtroom during a portion of jury selection was essential to protect Momah's right to an impartial jury. To the contrary, it is the individual questioning of prospective jurors that protected that right, not the closure of voir dire to the public. Thus, it is misleading to frame the issue as a weighing test between the right to a public trial and the right to an impartial jury. Rather, the competing interests were the right to a public trial and the trial judge's preferred method for conducting voir dire.

The procedure employed by the trial judge did not conform to our precedent which, as noted above, requires the trial court to eschew closing a courtroom without

[4]In his concurrence, Justice Pro Tempore Penoyar suggests that there is "'[n]o harm, no foul'" because there is no indication that anyone wishing to attend the court proceedings was excluded. Concurrence at 1. Whether members of the public or the media were present would not necessarily be reflected in the record. Furthermore, if there were people in the courtroom when the closure decision was made, they may not have known that they had the right to object. It is clear that the trial judge did not inform anyone of their right in that regard. *See Bone-Club*, 128 Wn.2d at 261 (noting that "an opportunity to object holds no 'practical meaning' unless the court informs potential objectors of the nature of the asserted interests" (quoting *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 39, 640 P.2d 716 (1982))).

first applying and weighing the five criteria set forth in *Bone-Club*. *State v. Easterling*, 157 Wn.2d 167, 175, 137 P.3d 825 (2006). The error here, in sum, was not necessarily closure of the courtroom, but the trial court's failure to perform the *Bone-Club* closure test prior to doing so.

III

The lack of specific findings in the record justifying closure is presumptively prejudicial to the constitutional right to have trials conducted publicly. *Orange*, 152 Wn.2d at 814; *Bone-Club*, 128 Wn.2d at 261-62. This court has previously held that when the trial court fails to consider and make specific findings concerning the public trial right, we cannot determine whether the closure was warranted. *State v. Brightman*, 155 Wn.2d 506, 518, 122 P.3d 150 (2005). In such situations, the transparency and fairness of criminal trials must be protected. *Easterling*, 157 Wn.2d at 178. The presumptive remedy for an unjustified closure of a criminal trial is remand for a new trial.[5] *Easterling*, 157 Wn.2d at 174; *Bone-Club*, 128 Wn.2d at 256.

The majority holds that a new trial is inappropriate for a defendant who seeks advantage by failing to object to a courtroom closure. This determination is premised on the faulty belief that closure somehow benefited Momah. As explained above, Momah's interest in an impartial jury could easily have been protected without closing the courtroom. Thus, the lack of an objection by Momah cannot be said to be a

[5]Unlike the majority, I will not speculate as to whether Momah received a fair trial after the trial judge inappropriately closed the courtroom without performing a *Bone-Club* analysis.

"tactical choice" suggested by the majority. Furthermore, the fact that Momah never requested closure of the courtroom and merely asked through his counsel that individual questioning of jurors take place in a courtroom belies the conclusion that trial tactics were in play.

It must be noted, also, "that a defendant does not waive his right to appeal an improper closure by failing to lodge a contemporaneous objection." *Easterling*, 157 Wn.2d at 176 n.8 (citing *Brightman*, 155 Wn.2d at 514-15). Significantly, the notion that waiver of a constitutional right can be implied by the actions of a defendant has been rejected by this court. *See City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984) (holding that the right to a jury trial can only be waived affirmatively and unequivocally). Because the right to a public trial is a right guaranteed to defendants in the same provision of the state constitution that guarantees the right to a trial by jury, it logically follows that the waiver of that right must be as express as that for waiver of a jury. In my view, the burden is on the trial judge to make certain that the defendant has affirmatively waived this constitutional right before taking it away from him. *Easterling*, 157 Wn.2d at 176. That waiver should be "knowing, voluntary, and intelligent." *Acrey*, 103 Wn.2d at 208-09. Regrettably, the trial judge failed to inform Momah of his right to a public trial and failed to provide him with the opportunity to object to the closure.

Lastly, I must observe that a new trial is not a "windfall" for anyone when public trial rights are set aside for the sake of expediency. When a trial is closed without the

benefit of a *Bone-Club* analysis, there is a high risk of violating public trial rights and damaging the public's trust of its courts. We must always remember the "constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts [and] is integral to our system of government." *Easterling*, 157 Wn.2d at 187 (Chambers, J., concurring). As Justice Chambers said in his concurrence in *Easterling*:

> "The open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust. This openness is a vital part of our constitution and our history. The right of the public, including the press, to access trials and court records may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified."

Id. at 185 (quoting *Dreiling v. Jain*, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004)).

Justice Chambers went on to say:

> Our constitution requires that justice be administered openly in court*rooms* just as much as it must be reflected in open court *records*. Fidelity to the constitution requires some meaningful remedy if a courtroom is improperly closed.
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> . . . .
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> . . . . I completely agree . . . that there may be a case, there may be many cases, where substantive justice to the parties was done behind locked doors. Defendants themselves might even want the courtrooms closed for many rational reasons. But whether or not the defendant got due process of law is a completely different question from whether our article I, section 10 was violated. While a defendant may not herself be harmed by a hearing in a closed courtroom, there is no case where the harm to the principle of openness, as enshrined in our state constitution, can properly be described as de minimis. Thus, I cannot agree that there could ever be a proper exception to the principle that a courtroom may be closed without a proper hearing and order.

Id. at 185-86 (citing *Orange*, 152 Wn.2d at 806-07).

IV

From the record we have, there appears to be no justification for closing the courtroom to the public. If there was a valid reason for doing so, it is not apparent from the record because the trial judge did not perform a *Bone-Club* analysis prior to closing the courtroom. Neither did he make formal findings or conclusions justifying the closure. Thus, it is impossible to know exactly what motivated the trial judge's decision to partially close voir dire. While it may appear to some that a new trial is a steep price to pay for the closure of the courtroom for a portion of a trial, the expense of a retrial pales in comparison to the harm done to the constitutionally guaranteed right to have justice in this state administered openly.

For the foregoing reasons, I dissent.

AUTHOR:
Chief Justice Gerry L. Alexander

WE CONCUR:

Justice Richard B. Sanders

Justice Tom Chambers